No. 83-0317

IN THE

# Supreme Court of the United States

October Term, 1983

SHERMAN BLOCK, *et al.*,

*Petitioners,*

*vs.*

DENNIS RUTHERFORD, HAROLD TAYLOR, and RICHARD ORR,

*Respondents.*

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.**

## PETITIONERS' REPLY BRIEF.

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## ARGUMENT.

### 1. Jail Standards That Recommended Contact Visitation Are Not Controlling, Mandatory, nor Widely Accepted.

The published standards of the National Sheriff's Association, the American Correctional Association, and the New York City Department of Corrections add little. Such standards are not controlling. *Bell v. Wolfish*, 441 U.S. 520, 544, n. 27 (1978) The National Sheriff's Association's standards contain a specific disclaimer that they are not the official position of the National Sheriff's Association (RT 4237; 4484:14-23). Uncontradicted testimony indicated such standards were designed as a guideline as to what courts were then ordering (RT 4238:4-9), and were never intended to be imposed on all sheriff's facilities (RT 4482:2-6). Uncontradicted testimony indicated that the American Correctional Association's standards were promulgated, at least in

part, on the assumption, later proved incorrect, that their adoption would immunize a facility from prisoners' rights litigation (RT 4483). Uncontradicted testimony indicated that the New York standards were adopted, at least in part, in the face of strong judicial statements as to what would be ordered, and to avoid further litigation (RT 4339:22-4340:1).

Plaintiffs also urge that California Penal Code Sections 2600 (Resp. Brief, p. 1), which provides that state prison inmates may be deprived of only such rights as necessary to provide for the reasonable security of the prison and the public; and 2601 (*id.*), which provides that state prisoners retain a right "[t]o have personal visits" subject to the reasonable security of the institution, add little, even if they might be construed as applicable to jails, as well as prisons. *Cf. DeLancie v. Superior Court* (1982) 31 Cal.3d 865, 872 and n. 6.[1]

Even if these provisions were applicable, the Jail is in compliance with Sections 2600 and 2601. These sections do not require or specify contact visits, but merely require that inmates be permitted personal visits, a right which is extant at Central Jail.

Plaintiffs further reliance on the administrative regulations of the State Department of Corrections for the operation of its own prisons is misplaced, however. Section 3170[2] of Title 15 of the California Administrative Code is

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[1]*DeLancie* dealt with a different issue, the monitoring of inmate conversations. Moreover, the court said specifically in note 6 (31 Cal.3d at 872): "We do not imply that county jails must follow exactly the same procedures as are followed in state prisons. Whether a measure is essential to institutional security will depend on many factors, and thus may vary from one facility to the next. We hold only that detainees' status as inmates in a county jail instead of state prison in itself is no reason to deny them rights afforded prison inmates."

[2]Section 3170 limits the use of barriers to prevent physical contact during visitation at state prisons (See Resp. Brief, pp. 1-2).

contained in Division 3, Chapter 1, "Department of Corrections . . . Rules and Regulations of the Director of Corrections," and is applicable only to "persons committed to the custody of the director, and to all employees of the Department of Corrections." California Administrative Code, Title 15, Chapter 1, *Preface*. These are the Director's rules and regulations for his own prisons.

With regard to local jails, however, the Department of Corrections also has the duty to prescribe Minimum Jail Standards. California Penal Code Section 6030. These standards are set forth in Division 1 of Title 15 of the California Administrative Code. With regard to jails, §1062 of Title 15 of the California Administrative Code provides in pertinent part: "Contact visits shall be allowed at least to minimum security prisoners housed in Type III and Type IV facilities and in Type II facilities *which are designed and constructed for contact visits*." [Emphasis added.].

Central Jail is a Type II facility,[3] and under California Minimum Jail Standards is not required to permit contact visitation even as to minimum security inmates unless it was designed and constructed to permit such visits. Central Jail was not designed and constructed to permit contact visits (Lonergan Affidavit, CT 216); and, in any event the Jail has been certified as in compliance with California Minimum Jail Standards by the Department of Corrections. (Id.)"

The significance of these provisions is not only a recognition of the differences in security risks at jails and prisons, but also, consistent with the record in this case, a recognition that contact visitation is generally not feasible

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[3]California Administrative Code, Title 15, §1006(4) provides: " 'Type II facility' means a local detention facility used for the detention of persons pending arraignment, after arraignment, and during trial, and upon a sentence of commitment. Detention in such facilities may be indefinite during trial and up to one year upon commitment."

at a facility that was not designed and constructed to permit them. (Lonergan, RT 4540-46; Sumner, RT 4606:4-4608:13; Gaston, RT 4322:23-4323:8; Nagel, RT 4186:20-4187:14; Patterson, RT 4593-97)

**2. The Fact That Other Jails or Prisons May Permit Contact Visitation Is Not Controlling. Not Only Do Many of Those Facilities Experience Significant Problems With Such Visitation, but the Central Jail Facility Is Uniquely Different.**

The plaintiffs argue that most prisons, and an increasing number of jails, permit contact visits. However, six to eight years before the trial of this matter (when Central Jail was constructed), contact visits in jails was not the practice (Nagel, RT 4158:13-14). Some jails that later implemented contact visits are now considering discontinuing them because of the resulting problems (RT 4437-38). Many prisons which permit such visitation do so, not because it is risk-free, but because for their inmates under their circumstances, the administrators believe the benefits outweigh the risks (Patterson, RT 4588:20-24; Sumner, RT 4601:16-19; Nagel, RT 4167:5-6).

This is not to say that contact visitation is not feasible in some facilities throughout the country. Nevertheless, contact visitation has at the same time caused serious problems, particularly in local jails of considerable size (RT 4547). The fact that some institutions permit contact visitation is not controlling, and merely represents differences in opinion as to what those responsible for those institutions consider to be prudent there. *Cf. Feeley v. Sampson*, 570 F.2d 364, 373 (1st Cir. 1978).

Moreover, the simple answer is that there is no other institution similar to Men's Central Jail. The plaintiffs point out that Central Jail, with a rated capacity in excess of 5,000

inmates, is the largest facility in the country, with the next largest having about half as many prisoners.[4] The professed experts who testified for plaintiffs had little experience with such a facility. Nagel had seen one jail with a population over 2,000 (RT 4215:9-25); Patterson stated Central Jail was unlike anything he had ever had any experience with in terms of management (RT 4591:2-3). Gaston, who was the warden of New York City's largest facility, testified that there was no way you could have a viable contact visitation operation at Central Jail (RT 4316).

In addition, the inmate population and the problems it presents is unique at Central Jail. Plaintiffs' expert recognized that the nature of a jail's inmates differs enormously around the country (Nagel, RT 4222:11-13), and the resulting security concerns differ, as well (Nagel, RT 4223:5-8). The staff at Central Jail must deal with a substantial violent and narcotic oriented jail gang problem which is not prevalent in other jails, such as New York's facilities (Gaston, RT 4323-4; Lonergan, RT 4453). The drug problems in Los Angeles County are severe (RT 4266:12-16), and involve much greater use of dangerous psychotropic drugs than elsewhere in the country.[5]

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[4]The unique size of this facility is a reflection of the unique character of the County of Los Angeles in terms of area and population. The County of Los Angeles is a large metropolitan county with a population in excess of 7,000,000 people, and unlike other large metropolitan areas, the population is densely spread over 4,000 square miles (JA 55). The centralization of pretrial detainees is necessitated by the fact that, under California law, the sheriff must transport about 20 percent of them each day to 26 separate jurisdictional courts located over this wide expanse, and that prisoners often have mandatory court appearances in more than one of these courts during their stay (JA 73-75).

[5]Such as phencyclidine (PCP), which is easily concealable. Small dosages can cause violent and psychotic reactions hours or days after ingestion (RT 4417:17-22; 4418:4-10). Unlike most other facilities (Nagel, RT 4253:3-9; Gaston, RT 4329:11-12; 4329:18-25), a substantial portion of Central Jail's population are actual or potential PCP abusers (RT 4420:3-9).

### 3. The "Totality" of Conditions at the Jail, to the Extent They Are Relevant, Militate Against Contact Visits.

Plaintiffs argue that because Men's Central Jail is an "old"[6] facility which differs from the MCC facility at issue in *Bell v. Wolfish*,[7] and that because of the "totality" of other conditions at the Jail (which were found by the District Court to be constitutionally adequate),[8] that a different and more strenuous standard of review than that promulgated in *Wolfish* should be applied to the questions of contact visits and the search procedures at issue in this case.

There is no indication that the District Court considered such factors, and it is difficult to see how such factors are rationally connected to the visitation and search procedures.

There is nothing inherent in the age or design of the facility itself that enhances the importance of contact visits or minimizes the legitimacy of the security concerns. To the contrary, most experts agreed that the security risks are greater when a contact visit program is imposed on a facility not designed for it than when a facility is designed to permit it (*Cf.*, Nagel, RT 4228:4-7; Lonergan, RT 4540-46; Sum-

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[6]"Old" is a relative term. The original facility was built in 1963, and the major addition thereto, which houses about one-half of the inmates, was designed shortly before trial, about 1975. (Anthony Affidavit, CT 216). At the time these facilities were designed, every effort was made to incorporate the then most were advanced and accepted philosophies concerning detention facilities. (*Id.*) Both facilities complied with Minimum Jail Standards promulgated by the State of California under state law (Lonergan affidavit, attachment, CT 270-271).

[7]The majority opinion states that the Court's analysis ". . . does not turn on the particulars of the MCC concept or design. . . ." *Bell v. Wolfish, supra*, 441 U.S. at 525.

[8]The "totality" of conditions now disparaged by plaintiffs were either found by the District Court to meet constitutional mandates, or orders changing the conditions brought them into line with constitutional requirements. These matters were not appealed, and should be presumed constitutional as the District Court concluded.

ner, RT 4186-87; Gaston, RT 4322-23; Patterson, RT 4593-97).

In pointing out the differences between the MCC facility and Central Jail, other than the relative age of these facilities, the plaintiffs concentrated on the relative degree of freedom of movement[9] at the two facilities (Resp. Brief, p. 26). Whatever relevance this factor has, it is clear that implementing contact visits will substantially reduce the freedom of movement within the Central Jail facility in order to minimize the intermixing of inmates after visits (Gaston, RT 4330:14-20).

If the "totality" of conditions are to be considered, a court should consider those factors that may minimize the need for contact visits. Those factors would include the high volume of non-contact visits permitted on a daily basis without approved visitor lists or intrusive security measures, and the alternative means of maintaining contact with family and friends through regular access to telephones and unrestricted mail.

**4. The Psychological, Emotional and Institutional Benefits That Are Argued to Result From Contact Visitation Are Not Free From Dispute.**

The only two studies placed in evidence concluded that there was no correlation between permitting contact visits and institutional benefits.[10]

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[9]It is a misconception to view inmates at Central Jail as con... their cells most of the day. To the contrary, the inmates are engaged in almost continual movement throughout the day (Robbins affidavit, CT 218, *et seq.*).

[10]The Report of the California Department of Corrections, Research Division, "Explorations in Inmate Family Relationships" (Exhibit 5), the Department's official position (RT 4639:19-4640), concluded:

> "Prison officials may be disappointed to learn that even numerous contacts with families and friends have little value as a controlling influence on behavior." (RT 4242).

The other study concluded:

> "No statistically significant relationship has been shown between the amount of disciplinary infractions committed and the inmates' personal contact with the outside community. The demonstrated occurrence can be disregarded as merely a chance occurrence in a random sample." (RT 4241).

(footnote continued on following page)

Plaintiffs have submitted a considerable amount of material on the psychological and emotional impact of denial of physical contact during visitation, and the adverse resulting impact on familial relationships. Plaintiffs' psychiatrist, however, while emphasizing the importance of contact visitation, recognized that the fact of detention itself is one of the most significant factors adversely affecting the inmate and his family (Kupers, RT 4656-57), that contact during visits was not necessarily the paramount means of maintaining communication with family and friends, that frequency of visits, access to telephones and mail may be of equal importance (Kupers, RT 4657A:25-4658:3; 4659:15-22), and that reasonable men within the field could differ as to the relative importance of these factors (Kupers, RT 4660:10-14). Another psychiatrist indicated that he could not say that contact visitation was more beneficial to the inmate than non-contact visitation (Verin, RT 4491:10-13), that contact visits may increase tensions (Verin, RT 4491:14-21), and that the risks inherent in contact visitation outweigh the benefits to the inmates (Verin, RT 4496).

**5. The Record Does Not Support a Conclusion That Risks Inherent in Contact Visits Can Be Adequately Avoided. Moreover, Security Measures Necessitated by Contact Visits Have Substantial Adverse Impact on Inmates.**

Plaintiffs contend that the risks inherent in contact visits can be adequately dealt with through strip searches of inmates, searches of visitors, metal detectors and fluoro-

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Even plaintiffs' experts recognized that there is a wealth of diversity of conclusions among respected persons in the field (Nagel, RT 4243:4-15). The warden of the New York Riker's Island facility, the City's largest, which has permitted contact visitation for years, stated there was no quantifiable evidence that contact visits reduce tension (Gaston, RT 4294:20-21); and, that they may increase tensions (*id.*, RT 4295-96; 4297:14-19).

scopes, surveillance, classification, and other measures.

There is almost universal agreement, however, that notwithstanding such measures, contact visitation will result in a significant increase in contraband within the jail, particularly narcotics. The district court so concluded: "*Any* program of contact visits does increase the importation of narcotics into a jail despite *all* safeguards." (Supp.Mem. Dec., PA 31; emphasis added). This is consistent with the weight of the testimony in the record.[11]

The primary method used is "ballooning".[12] Even plaintiffs' expert agreed the method generally cannot be detected (Nagel, RT 4167:5-6). Drugs do not show up on metal detectors and fluoroscopes (Nagel, RT 4170:9-10). The method is so pervasive at a New York jail that permits contact visitation, and uses the security measures advocated by plaintiffs, that the balloons used by the inmates have clogged the jail's sewer system (Gaston, RT 4287:14-4288:4).

While there are other means of smuggling contraband into a facility, most of the officials who testified felt that contact visits were the primary source of such contraband (Gaston, RT 4285, 4300, 4303; Lonergan, 4439:4-14; Sumner, RT 4602:6-11).

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[11]Plaintiffs' expert Patterson, a former prison warden, agreed that it is a foregone conclusion that you will get more contraband with contact visitation (RT 4594:14-17). The warden of a New York Jail that has had contact visitation for a number of years felt that the introduction of narcotics at his facility through contact visits was a pervasive problem (Gaston, RT 4286:2). Plaintiffs' expert Nagel recognized that the passage of drugs in balloons can't be detected (RT 4170:21-22), that there were numerous risks in contact visitation (RT 4167:5-6), and that surveillance, although important, was not adequate (RT 4234). *Cf.*, the testimony of the warden of San Quentin (Sumner, RT 4604:8-19; 4602:2-11).

[12]A process whereby narcotics are placed in a balloon, secreted on a visitor or in his mouth to avoid detection, passed to an inmate during a kiss or other contact (RT 4605:12-14), swallowed or concealed by the inmate and retrieved at a later time (RT 4287:14-4288:4).

Whether classification is an adequate means of identifying low risks is subject to considerable question. Even plaintiffs' main expert wrote: "Because people are so unpredictable, a person who is not an escape risk at one moment may become one overnight" (Nagel, RT 4264:5-11). Even if classification worked for this purpose, however, it is not feasible to prevent the intermixing of prisoners at this facility (Gaston, RT 4331:23-4332:20). Most administrators agreed that within jails and prisons there would be considerable pressure from those not permitted contact visits to coerce those who are to bring in contraband for them (Nagel, RT 4178:4-11; 4251:5-10; Gaston, RT 4294:4-8; Sumner, RT 4610:16-19; 4611:5).

The problems resulting from narcotics, and the efforts by inmates to control the trafficking in them, are serious and life-threatening (Sumner, RT 4602:2-10), particularly in this facility which has to deal with several well organized jail gangs which seek to control drug trafficking through violence (Lonergan, RT 3741-45; Exhibits ES, ET; *cf.*, Gaston, RT 4325-28).

Although drug trafficking is a major concern, it is not the only concern with contact visits. Metal detectors are ineffective in locating weapons and knives secreted in body cavities (Sumner, RT 4608:16-19), or plastic weapons and explosives (Lonergan, RT 4442). Administrators also expressed concern with altercations in the visiting areas (Gaston, RT 4291:21-22; Nagel, RT 4167:12-13), increased homosexual rapes, and sexual tensions (Verin, RT 4491:20-27; Gaston, RT 4296-97), increased tensions (Verin, RT 4491; Exhibit 5; RT 4639-41; Gaston, RT 4295-96), and the taking of hostages (Gaston, RT 4322).

The measures advocated and universally used by those who permit contact visits, to attempt to minimize these

inherent risks, have adverse consequences to the inmates that must also be considered.

The most obvious of these, and the one measure that was consistently agreed upon by all as a necessary concomitant to contact visitation, was a strip search of the inmates after visitation. As Justice Marshall ably pointed out in his dissent in *Wolfish*, the lower court in *Wolfish* found the strip search procedure "unpleasant, embarrassing and humiliating;" psychiatric testimony indicated that the procedures placed the inmates in the most degrading position possible, and other evidence indicated that the searches engendered among detainees fears of sexual assault, were the occasion for physical abuse, and caused some inmates to forego personal visits (441 U.S. at 578). Close and constant monitoring of contact visits may adversely disrupt the visits (*Wolfish*, n. 40, 441 U.S. at 560). The intrusive screening measures may be resented by visitors (Gaston, RT 4350:21-22).

Despite all reasonable safeguards, contact visitation uniquely creates substantial breaches of a facility's security, involving risks of harm to inmates and staff. Given these inherent and genuine risks, the substantial adverse impact of the necessary security precautions, and the numerous non-physical contact alternatives for maintaining a prisoner's relationships with his friends and relatives through frequent non-contact visitation, telephone calls, and mail, a determination to reject contact visitation in favor of these alternatives, should not, as a matter of law, be considered such an exaggerated response to security concerns that federal court intervention on constitutional grounds is warranted. The decision to assume these risks or to choose alternative methods should properly be the decision of the jail administrators or of the state or local agencies under whose laws they operate. *Cf., Wolfish, supra*, 441 U.S. at 562.

**6. Defendants' Concerns With the Search Procedures Are Consistent With Concerns of Other Administrators, and at Least as Significant as Those That Justified Reversing the Order Requiring Similar Procedures in *Wolfish*.**

Plaintiffs relegate to a footnote and seek to minimize certain of defendants' primary concerns with permitting inmates to view searches of their cells (Resp. Brief, n. 25). Yet, these concerns were set forth at the outset as major concerns. When Deputy Lombardi was asked about the sheriff's concerns with regard to the ordered procedures, her initial response indicated: "If they know where we search, they know where not to hide the contraband. . . . The closer we get to the contraband, the more upset they become, the more apt they are to become involved in an altercation with the officer. . . . They become very hostile and they want to distract the deputy searching, pull him away from whatever he is doing. (RT 4116:21 to 4117:4).

These concerns are very similar to those expressed by the warden of San Quentin Prison: "He is going to watch your cell search method and see where you miss, what areas you don't search. He is going to cause a problem if you start to get close to something he has hidden." (RT 4621: 13-16).

These concerns and the other concerns set forth in petitioners' opening brief are indistinguishable in terms of significance or genuineness from those that justified reversing the order requiring similar search procedures in *Wolfish*.

**Conclusion.**

For these reasons and the reasons set forth in petitioners' opening brief, the Court should reverse the opinion of the Ninth Circuit of July 14, 1983, affirming the judgment of the District Court of August 8, 1980, requiring the Sheriff

of the County of Los Angeles to permit contact visitation, and to conduct routine cell searches in the presence of available inmates at Los Angeles County Men's Central Jail.

Respectfully submitted,

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## APPENDIX.

### Statutory Provisions.

California Administrative Code, Title 15

*Division 1*, Subchapter 4, Minimum Standards for Local Detention Facilities.

* * * *

*§1006 Definitions*

* * * *

(4) 'Type II facility' means a local detention facility used for the detention of persons pending arraignment, after arraignment, and during trial, and upon sentence of commitment. Detention in such facilities may be indefinite during trial and up to one year upon commitment.

*§1062 Visiting*

* * * *

Contact visits shall be allowed at least to minimum security prisoners housed in Type III and Type IV facilities and in Type II facilities which are designed and constructed for contact visits.

*Division 3*. Department of Corrections.

Chapter 1. Rules and Regulations of the Director of Corrections.

*PREFACE*

* * * *

The rules and regulations of the director apply to all persons committed to the custody of the director, and to all employees of the Department of Corrections.

*Article 7. Visiting*.

§3170 General Visiting Policy [pertinent text set forth in Respondents' Brief, pp. 1-2].